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VIA ELECTRONIC MAIL

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Re: Removal of the Public Nuisance Provision from the Ohio State Implementation Plan

Dear Mr. Mooney and Mr. Nelson:

Thank you for meeting on October 1, 2019 to discuss correcting the Ohio state implementation plan ("SIP") to remove the public nuisance rule (OAC 3745-15-07) ("nuisance rule"). As we discussed at the meeting, the nuisance rule is a general rule prohibiting public nuisances. It has no connection with the purposes for which SIPs are developed and approved, no reasonable connection with the National Ambient Air Quality Standards ("NAAQS"), and has not been used by Ohio as part of its NAAQS control strategy. As such, the nuisance rule should not have been included in the SIP when it was approved by EPA in 1972 and then again in 1974.

Now that EPA is aware of the error, the SIP should be corrected using EPA's authority under Clean Air Act ("CAA") Section 110(k)(6), as EPA has done in numerous other instances. Using the agency's authority under CAA Section 110(k)(6) to remove the nuisance rule will conserve agency resources and expediently correct an error that has had unintended consequences for businesses in Ohio.

1. The Ohio Nuisance Rule Is Not Reasonably Related to Attainment and Maintenance of the NAAQS in Ohio

In 1979, after the 1977 Amendments to the Clean Air Act, EPA was in the process of reviewing many States' SIP submissions. At that time, EPA's Office of General Counsel ("OGC") advised its Regional Counsel that States' measures that either control non-criteria air pollutants or are not sufficiently related to the State's strategy for the attainment and maintenance of the NAAQS, may not legally be included in SIPs.[1] Over the past twenty years, numerous SIPs have been corrected to remove nuisance rules similar to Ohio's and other general air pollution control rules consistent with EPA's guidance.

The Ohio nuisance rule is most similar to the nuisance rules in California, Michigan, and Georgia, all of which were removed from the SIP using CAA Section 110(k)(6). The Ohio rule provides that:

> [t]he emission or escape into the open air from any source or sources whatsoever, of smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances, in such manner or in such amounts as to endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property, is hereby found and declared to be a public nuisance. It shall be unlawful for any person to cause, permit or maintain any such public nuisance.

The nuisance rule does not identify criteria air pollutants, require any particular reductions or controls, establish limits or standards, and reductions in emissions from compliance with the nuisance rule are not quantified or accounted for in the State's attainment demonstration. The Ohio rule is the classic example of a general prohibition on air pollution that bears no relation to reductions in NAAQS regulated pollutants.

Most recently, EPA issued a technical correction to the California SIP, to remove numerous local nuisance rules very similar to the Ohio nuisance rule that were "approved in error." 84 Fed. Reg. 45422, 45422 (August 29, 2019). In each case, the local rule prohibits the discharge of "air contaminants or other material which cause injury, detriment, nuisance, or annoyance . . . ." 83 Fed. Reg. 43577 (August 27, 2018); *see, e.g.*, Amador County APCD Rule 205 (nuisance); Butte County AQMD Section 2-1 (nuisance). EPA determined that the local

[1] Memorandum from Michael James, Associate General Counsel of EPA's Air, Noise, and Radiation Division to Regional Counsels and Air Branch Chief regarding "Status of State/Local Air Pollution Control Measures not related to NAAQS," February 9, 1979 ("OGC Memo").

nuisance rules were included in error because they are general prohibitions against air pollution and not part of the districts' NAAQS control strategies. *Id.* at 43576-77.

Michigan's Rule 901 was removed from Michigan's SIP in 1999 for similar reasons. EPA determined that Rule 901 is "a general rule that prohibits the emission of an air contaminant which is injurious to human health or safety . . . or which causes unreasonable interference with the comfortable enjoyment of life or property." 64 Fed. Reg. 7790, 7791 (Feb. 17, 1999). In using its authority to correct the Michigan SIP under CAA Section 110(k)(6), EPA explained that it was removing the nuisance rule from the SIP because it primarily has been used to address odors and other nuisances and "the rule does not have a reasonable connection to the national ambient air quality standards (NAAQS) and related air quality goals of the Clean Air Act." *Id.*

Likewise, Georgia's nuisance rule was removed from the SIP pursuant to CAA Section 110(k)(6) "because the rule is not related to the attainment and maintenance of the NAAQS." 71 Fed. Reg. 13551, 13552 (March 16, 2006).

Ohio's nuisance rule is no different than the California, Michigan, Georgia and other nuisance rules that have been removed from SIPs. The Ohio nuisance rule prohibits undefined quantities of "smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances . . . ." Similarly, the Michigan nuisance rule (Mich. Admin. Code R 336.1901) prohibits "air contaminants," defined as "dust, fume, gas, mist, odor, smoke, vapor, or any combination thereof." *Id.* at R 336.1101(f). The Georgia nuisance rule (Ga. Comp. R. & Regs. 391-3-1-.02(2)(a)(1)) also prohibits "air contaminants", including but not limited to "solid or liquid particulate matter, dust, fumes, gas, mist, smoke, or vapor . . . ." *Id.* at 391-3-1-.01(c). And many of the local rules removed from the California SIP prohibit "air contaminants," which are defined, for example, to include "smoke, dust, charred paper, soot, grime, carbon, noxious acids, fumes, gases, odors, or particulate matter." Amador County APCD Rule 102 (definition of "air contaminant or pollutant"); Amador County APCD Rule 205 (nuisance).

The term "air contaminant," as used in the California, Michigan, Georgia, and other nuisance rules, matches the list of substances regulated in the Ohio nuisance rule, i.e., "smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or any other substances or combinations of substances." *Cf., e.g.*, N.Y. Comp. Codes R. & Regs. tit. 6, § 211.1 (general prohibition on the emission of "air contaminants," defined at § 200.1 to include "chemical[s], dust, compound[s], fume[s], gas[es], mist, odor[s], smoke, vapor[s], pollen or any combination thereof"). There is nothing unique about the substances regulated under the Ohio nuisance rule.

During our meeting, EPA asked whether the reference to "dust" in the Ohio nuisance rule could be viewed as controlling particulate matter or whether the reference to "acids" could be viewed as controlling sulfur dioxide emissions. While it is possible that prohibiting undefined quantities of dust and acids has the incidental effect of reducing some quantity of PM or SO2, reducing criteria air pollutants is not the purpose of the rule and the rule is not sufficiently prescriptive to be used by Ohio as part of its NAAQS control strategy for PM or SO2. If the incidental control of criteria air pollutants was sufficient to make a rule part of the State NAAQS control strategy, EPA would not have been able to make the corrections it did to the California, Georgia, Michigan, and numerous other SIPs.

As a practical matter, it is impossible for Ohio to quantify reductions in criteria air pollutant emissions attributable to the nuisance rule based on the vague language in the rule, and Ohio has not done so. Compliance with the nuisance rule can only be determined through case-by-case adjudications of subjective factors, without any pre-defined compliance test methods. Compare the citizen suit provision in CAA Section 304, which requires that a claim must be premised on an enforceable emission standard or limitation to be cognizable, stating in part that "Section 304 would not substitute a 'common law' or court-developed definition of air quality." S. Rep. No. 91-1196, at 36, 37-38 (1970). Unlike CAA Section 110(a)(2), the nuisance rule does not limit "the quantity, rate, or concentration of emissions of air pollutants on a continuous basis" to enable a State to rely on it for purposes of its NAAQS demonstration. At least this level of specificity is also needed for States to be able to demonstrate that they are attaining and maintaining compliance with the NAAQS.

To violate the Ohio nuisance rule, a source must emit enough smoke, ashes, dust, dirt, grime, acids, fumes, gases, vapors, or other substances to "endanger the health, safety or welfare of the public, or cause unreasonable injury or damage to property." OAC 3745-15-07. The rule provides no objective or quantitative measure of the amount of emissions that would endanger the public or unreasonably injure or damage property. For this reason, the nuisance rule is not sufficiently prescriptive to be used by Ohio to meet its legal obligation to demonstrate the attainment and maintenance of the NAAQS.

In contrast, there are provisions in the Ohio SIP expressly intended to control criteria air pollutant emissions, including nitrogen oxides, particulate matter, and sulfur dioxide. *See, e.g.*, OAC 3745-14, nitrogen oxides; OAC 3745-17, particulate matter; OC 3745-18, sulfur dioxide. They specify the quantity, rate, or concentration of each air pollutant that may be emitted and Ohio uses these provisions as part of the State NAAQS control strategy and in the attainment demonstration. The nuisance rule is entirely different from the pollutant specific limits used by Ohio to demonstrate attainment and maintenance of the NAAQS.

2. EPA Should Use Its CAA Section 110(k)(6) Authority to Correct the Error

CAA Section 110(k)(6) (Corrections), is the mechanism to be used by EPA to correct an error in a SIP approval. As you know, it provides that, whenever EPA determines that its "action approving, disapproving, or promulgating any plan or plan revision (or part thereof) . . . was in error, [EPA] may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate *without requiring any further submission from the State*." 42 U.S.C. § 7410(k)(6) (emphasis added). It authorizes EPA to correct a SIP where "(1) EPA clearly erred in failing to consider or inappropriately considered information made available to EPA at the time of the promulgation, or the information made available at the time of promulgation is subsequently demonstrated to have been clearly inadequate; and (2) other information persuasively supports a change in the regulation." *See* 57 Fed. Reg. 56762, 56763 (November 30, 1992).

In contrast, CAA Section 110(k)(5) (Calls for Plan Revisions) is to be used when EPA determines that a SIP is inadequate to attain or maintain compliance with the NAAQS. Under CAA Section 110(a)(2)(h), State plans must provide for revisions from time to time as may be necessary to account for revisions to NAAQS standards and when EPA determines that the SIP is substantially inadequate to attain the NAAQS. Section 110(l) (Plan Revisions) describes the mechanics of doing so. In addition to being the legally correct vehicle to be used to correct an error in a SIP approval, Section 110(k)(6) has the advantage of being the fastest mechanism and conserves agency resources while affording the public the opportunity for notice and public comment.

Using Section 110(k)(6) to revise the SIP is also consistent with the OGC Memo.[2] As EPA's General Counsel recognized at the time, States "may not always differentiate between their regulations to control criteria pollutants and their air pollution control regulations in general." *Id.* EPA's General Counsel advised EPA that it should differentiate if the State does not and that EPA should not act on an identified non-criteria pollutant measure because it cannot legally be part of the SIP. The OGC Memo directs EPA to prevent errors in the SIP, even when they are the result of an error in the State submission. Therefore, EPA should use Section 110(k)(6) to correct its error even though Ohio erred by including the nuisance rule in its plan submission.

During our meeting, EPA asked if Ohio intended for the nuisance rule to remain a part of the SIP when, in 1984, it removed odors from the rule (OAC 3745-15-07(B)) but left the general

[2] OGC Memo, *supra* note 1.

nuisance provision in OAC 3745-15-07(A). The reason Ohio's SIP was revised in 1984 to narrow the scope of the nuisance rule was explained in Am. Sub. SB 78, enacted by the 139th General Assembly, effective June 29, 1982 (copy attached). That legislation excluded "agricultural production activities" from Ohio EPA's jurisdiction under the Ohio Air Pollution Control Act, by amending the definition of "air contaminant" in Section 3704.01(B) of the Ohio Revised Code.

The only Ohio EPA air pollution rule that applied to "agricultural production activities" at the time was the nuisance rule, OAC 3745-15-07. Since "agricultural production activities" were not subject to regulation under Chapters 3745-17, -18, -21, or -31, odors from "agricultural production activities" were not subject to OAC 3745-15-07 as amended in 1982. Eliminating the applicability of the nuisance rule to odors from "agricultural production activities" did not reflect a judgment on the part of Ohio EPA that the remaining provisions of OAC 3745-15-07 were related to attainment and maintenance of the NAAQS. The SIP had to be revised to comply with the General Assembly mandate to exempt agricultural operations and did not reflect any determination that the odor provisions were not appropriately included in the SIP. Importantly, OAC 3745-15-07 still applies to odors from the vast majority of sources in Ohio, i.e., those sources subject to regulation under OAC Chapters 3745-17, -18, -21, or -31.

As we also discussed, Ohio submitted a request to modify the SIP in 1999 to remove the nuisance rule. Ohio would not have requested that the nuisance rule be removed from the SIP if the nuisance rule were part of its NAAQS control strategy.

3. The Removal of the Nuisance Rules Will Not Lessen Environmental Protection in Ohio

Removing the nuisance rule from the SIP will not lessen environmental protection in Ohio or its local neighborhoods. As EPA noted when it removed a similar provision from the Michigan SIP, "[a]lthough Rule 901 will be removed from the SIP, Rule 901 will remain as a state rule and still be enforceable at the State level." 64 Fed. Reg. 7790, 7791 (Feb. 17, 1999). EPA also noted that the regulations intended to attain the NAAQS will still be federally enforceable and the State and EPA retain the ability to take action under Section 303 of the CAA to prevent an imminent and substantial endangerment. *Id.* For the same reasons, correcting the Ohio SIP will not lessen environmental protection in Ohio.

4. Conclusion

There is no evidence that the former Ohio Air Pollution Control Board, in 1972 when the nuisance rule (then AP-02-07) was submitted, or in 1974 when the nuisance rule was approved as part of the SIP, determined that the nuisance rule was "necessary or appropriate" to attain and maintain the NAAQS. Since then, there is no evidence that Ohio has relied on the nuisance rule in any attainment demonstration or otherwise considers the nuisance rule to be part of its NAAQS control strategy.

Accordingly, EPA's May 31, 1972 and April 15, 1974 approvals of Ohio's SIP were in error. As EPA has done in other States, it should correct the error using CAA Section 110(k)(6) to conserve agency resources and expedite the correction of an error that has had the unintended consequence of harming businesses in Ohio.

Very truly yours,

LeAnn Johnson Koch

Attachment

cc: Cheryl Newton (via electronic mail)
Kurt Thiede, Esq. (via electronic mail)